(3)

No. 94-197

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, individually and in her official capacity as Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; THOMAS HAYES, Director, California Department of Finance,

Petitioners,

v.

DESHAWN GREEN, DEBBY VENTURELLA, and DIANA P. BERTOLLT, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should overrule its longstanding and unbroken line of precedents holding that the Constitution prevents a State from discriminating against bona fide residents in the distribution of welfare assistance based solely upon their status as recent migrants from another State.

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BRIEF IN OPPOSITION

Respondents Deshawn Green, Debby Venturella, and Diana P. Bertollt, on behalf of themselves and all others similarly situated, respectfully ask the Court to deny the petition for writ of certiorari, for the reasons stated below.

STATEMENT OF THE CASE

The statute at issue in this case imposes a one year durational residency requirement on the receipt of Aid to Families With Dependent Children ("AFDC") in California. Cal. Welf. & Inst. Code § 11450.03 (West 1994). For the first year of residency, the California statute limits the public assistance of an otherwise eligible newcomer and bona fide California resident family by as much as eighty percent of the amount granted to longer-term residents, based on the assistance levels provided in the needy family's previous state.

For example, a family of four moving to California from Mississippi would receive only $144 per month in AFDC assistance, instead of the standard California grant of $743. Pls.' Ex. 3 at l6, 25-26; CR 69.[1] The statute thereby creates two classes composed of equally needy state residents, distinguishable only by their length of most recent residence within California. Members of one class – solely because of shorter residency – have their benefits reduced. Further, within the disadvantaged class of new residents, the statute establishes forty-six separate tiers of grant levels based only on the state of prior residence.

The three named Plaintiffs all moved to California shortly before this lawsuit was commenced for reasons unrelated to the receipt of welfare benefits. Pet. App. at A4-5; *Green v. Anderson*, 811 F. Supp. 516, 517 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994). Plaintiff Deshawn Green had previously lived in California. *Id.* All three of

[1] Citations are to both the exhibit number before the District Court ("Pls.' Ex.") as well as the clerk's record number at the Ninth Circuit ("CR").

the named Plaintiffs were escaping abusive domestic circumstances and moved to California to be with relatives. *Id.*

As the Plaintiffs had not lived in California for twelve consecutive months prior to their applications, they were subject to reduced assistance levels by operation of the residency requirement. When Respondents filed this case, the standard monthly assistance level for a family of three receiving AFDC in California was $624, and for a family of two, $504. Ms. Green and Plaintiff Debby Venturella, who had not received AFDC in her state of prior residence, were to receive grants of $190 and $341 a month respectively for their families of three as a consequence of the requirement; Plaintiff Diana Bertollt's assistance level for her family of two was to be $280 per month. Pet. App. at A4-5; *Green*, 811 F. Supp. at 517.

The District Court found that the residency requirement "produce[d] substantial disparities in benefit levels," and "materially diminishe[d]" AFDC benefits. Pet. App. at A13, 14; *Green*, 811 F. Supp. at 521. Petitioners submitted no evidence to the District Court to controvert expert testimony that, given the high cost of living in California coupled with the lower grant levels in most other states, newcomer residents subject to the residency requirement would incur severe difficulties securing housing, forcing them "into overcrowded or substandard quarters or even to become homeless, all of which can pose significant health and safety risks to residents, especially children." Pls.' Ex. 19 at 8, lines 12-14; CR 69; *see also* Pet. App. at A14-15 n.13; *Green*, 811 F. Supp. at 521 n.13.

The District Court also held that "unless the purpose here is to deter migration, there is no other rational basis for the distinction drawn among applicants all of whom are California residents." Pet. App. at A17-18; *Green*, 811 F. Supp. at 523. The legislative history of the measure demonstrated that the purpose behind enactment of the durational residency statute was, in fact, to discourage indigent families from moving to California. For example, during the debate on the California Assembly floor, the principal Assembly author of the measure's predecessor bill stated:

> Realizing that in fact funds are short in California today, it makes a great deal of sense then to insure that incentives are provided for people from other parts of the country . . . that might be lured to California . . . for that purpose – to benefit from higher assistance. This legislation attempts to take care of that by requiring a one year residency requirement in California. . . .

Pet. App. at A15 n.14; *Green*, 811 F. Supp. at 522 n.14.

The State in its waiver request to the federal government seeking approval for imposition of the requirement, described the durational residency requirement as follows: "This proposal reduces the incentive for families to migrate to California for the purpose of obtaining higher aid payments." Pet. App. at A16 n.14; *Green*, 811 F. Supp. at 522 n.14.[2] Petitioners in their brief opposing the temporary restraining order in this case listed "among the bases

[2] On the day this action was filed, Petitioner Anderson issued a press release describing the aim of the challenged statute as "discouraging people from coming to California just for higher welfare benefits." Pls.' Ex. 26; CR 35.

for implementation of the statute: 'to prevent California from being a magnet for people seeking to increase the level of their public assistance benefits by moving to California.'" *Id.* Finally, as the courts below noted, "such a purpose is inherent in a two-tier benefit structure. Because § 11450.03 does not save money by cutting all recipients' benefits equally, but instead affects only the benefits of new residents, its very structure suggests a goal of deterrence." *Id.*

The District Court, applying *Shapiro v. Thompson*, 394 U.S. 618 (1969), and other cases decided by this Court, found that Plaintiffs faced irreparable injury and were likely to succeed on the merits of their claim that the statute penalized newly-arrived residents for exercising their right to migrate interstate, and issued a preliminary injunction. Pet. App. at A3-20; *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993). The court held that "the State may not deny certain of its residents full welfare benefits simply because of the recency of their residency." Pet. App. at A18; *Green*, 811 F. Supp. at 523.

The Court of Appeals for the Ninth Circuit summarily affirmed the preliminary injunction for the reasons stated in the District Court's order, and retained jurisdiction over the case. Pet. App. at A1-2; *Green*, 26 F.3d 95. Petitioners did not seek rehearing or rehearing *en banc* from the Court of Appeals.

This petition represents the second time in the past eight months that Petitioners have requested review by this Court of the same issue. The State of California previously filed an amicus brief in support of a petition for writ of certiorari submitted by the State of Minnesota

in *Steffen v. Mitchell*, No. 93-720. The Court denied review on January 18, 1994. ___ U.S. ___, 114 S. Ct. 902.[3]

The residency requirement enjoined by the courts below became effective only upon the approval, in the form of a waiver of certain federal requirements, of the United States Secretary of Health and Human Services. Cal. Welf. & Inst. Code § 11450.03(b) (West 1994); Pet. App. at A4; *Green*, 811 F. Supp. at 517. On July 13, 1994, the Ninth Circuit Court of Appeals vacated this waiver, and remanded the matter to the District Court with instructions to remand to the Secretary for compliance with the statutory mandate controlling grants of waivers. *Beno v. Shalala*, ___ F.3d ___, No. 93-16411, 1994 U.S. App. LEXIS 17043 (9th Cir. July 13, 1994). Although California has petitioned for rehearing, the Secretary, whose waiver is at issue in the *Beno* case, has announced that she will not seek review of that ruling.[4]

SUMMARY OF ARGUMENT

This case does not present any issues which merit review by this Court. The State has neither alleged nor shown either a conflict between federal or state courts or a departure from this Court's precedents. The State's assertion that the case presents an important question of

[3] The Court also denied review in a California residency case in 1992. *Del Monte v. Wilson*, 824 P.2d 632 (Cal.), *cert. denied sub nom. Wilson v. Del Monte*, No. 91-1885, ___ U.S. ___, 113 S. Ct. 490 (1992).

[4] A copy of the letter from counsel for the federal appellees to the Clerk for the Ninth Circuit is attached as Exhibit 1 to this brief.

federal law which has not yet been addressed by this Court is erroneous. A well-settled line of Supreme Court cases on residency discrimination has repeatedly addressed and rejected all of the arguments made by Petitioners in this case. Under those precedents, the United States Court of Appeals for the Ninth Circuit correctly affirmed the preliminary injunction of the District Court.

In light of the strong precedent supporting the lower court decisions, Petitioners resort to asking this Court to overrule a quarter-century of case law. Yet barely seven months ago this Court rejected the identical request in the context of a durational residency requirement which worked a less onerous penalty than the California statute here. *Steffen v. Mitchell*, 504 N.W. 2d 198 (Minn. 1993), *cert. denied*, No. 93-720, ___ U.S. ___, 114 S. Ct. 902 (1994). Petitioners here, as in *Steffen*, have failed to identify any compelling reason why this Court should ignore *stare decisis* and take the extraordinary step of overruling its long-standing and unbroken line of precedents.

Moreover, as the courts below concluded, even under the rational basis review which Petitioners urge this Court to apply, the California residency requirement still fails because Petitioners have never proffered any constitutionally-sound rational basis for discriminating against only newcomers in the distribution of welfare benefits. The courts below determined upon an extensive factual record that the only reason explaining enactment of the statute was a constitutionally impermissible intent to discourage newcomers from migrating to California.

In any event, a decision overruling the residency discrimination cases and reversing the decision of the Court of Appeals would not change the result in this case. As Petitioners concede, "[o]n July 13, 1994, the Ninth Circuit vacated the federal waivers necessary to implement the provisions of this section." Pet. at 5 n.4. Thus, this case has become both moot and not ripe for review. The decision sought by the State from this Court would be merely advisory.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS ALREADY ADDRESSED THE QUESTION PRESENTED IN THIS CASE.

The State's assertion that its durational residency statute presents a new question not previously determined by this Court is erroneous. As the courts below noted, numerous prior decisions of this Court have held or reaffirmed that statutes which reduce welfare benefits necessary to meet basic needs only for new residents are unconstitutional.

The right to interstate migration, of course, has been long recognized as essential to our federalism. As the court below observed: "the Supreme Court repeatedly has held that such a right inheres in the concept of a union." Pet. App. at A7; *Green*, 811 F. Supp. at 518. Accordingly, "[t]he Court consistently has rejected state preferences for longer term residents" (Pet. App. at A8; *Green*, 811 F. Supp. at 528), and "has almost invariably found that durational residency requirements are unconstitutional". Pet. App. at A8; *Green*, 811 F. Supp. at 519.

Specifically, this Court has often declared that states may not try to fence out indigents or to ration benefits based upon length of residency in a state. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 899-912 (plurality), 912-916 (concurring opinions) (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941). As the courts below concluded, "the Supreme Court of the United States, in what is now a large body of law, has made clear that the constitutionally based rights to migration and equal treatment do not permit significant distinctions between new and old residents based on the duration or incipiency of their residency." Pet. App. at A18; *Green*, 811 F. Supp. at 523.[5]

As the courts below found, the durational residency statute here deprives newly-arrived residents of the ability to obtain basic necessities of life, including shelter, medical care, and clothing, solely because the new residents have recently exercised their right to interstate migration. Pet. App. at A13-14, and n.13; *Green*, 811 F. Supp. at 521, and n.13. This Court, in *Shapiro v. Thompson*, 394 U.S. 618, held that states may not constitutionally restrict welfare benefits for new residents by imposing

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[5] *See also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (holding that "[t]his federalist structure of joint sovereigns preserves to the people numerous advantages" including "making government more responsive by putting the states in competition for a mobile citizenry.") The durational residency requirement here shatters that structure: States would compete to keep the poor among the citizenry outside their boundaries.

durational residency requirements. *See also Memorial Hospital v. Maricopa County*, 415 U.S. 250. The California statute is unconstitutional under the express holding of *Shapiro* and its progeny. And, as the district court concluded, "[i]f this durational residency requirement were valid, then so would a measure limiting new residents to the same level of medical, educational, police, and fire services they received in the state of prior residence." Pet. App. at A16-17; *Green*, 811 F. Supp. at 522.

The State argues that the California statute is somehow different, asserting that the purpose of the statute is merely to remove the level of welfare benefits as "one of the factors a person might consider when contemplating a move to California." Pet. at 15. This assertion is surely without any factual support as to the Plaintiffs in this case, since they fled to California to escape abusive domestic circumstances. Pet. App. at A5; *Green*, 811 F. Supp. at 517. But, in any event, this Court has already addressed this precise issue: "[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." *Shapiro*, 394 U.S. at 631. In *Memorial Hospital*, the Court restated this position, explaining that "[a]n indigent who considers the quality of public hospital facilities in entering the State is no less deserving than one who moves into the State in order to take advantage of its better educational facilities." *Memorial Hospital*, 415 U.S. at 264. More recently in *Zobel*, the Court noted that an attempt to inhibit migration into a state would encounter "insurmountable constitutional difficulties." 457 U.S. at 62 n.9; *accord Hooper*, 472 U.S. at 620 n.9.

In essence, Petitioners argue that the right to interstate migration and its attendant heightened scrutiny are not implicated here because new residents are in no worse position than they were in their state of prior residence. The State's legal analysis is fundamentally flawed. As the Courts below observed, "the relevant comparison is not between recent residents of the State of California and residents of other states. . . . It is because the measure treats recent residents of California different than other *California* residents, and involves the basic necessities of life, that it places a penalty on migration." Pet. App. at A14; *Green*, 811 F. Supp. at 521 (emphasis in original).

This Court has repeatedly reaffirmed this central holding of *Shapiro*. For example, in *Memorial Hospital*, the Court held: "[T]he right of interstate travel must be seen as insuring new residents the *same* right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." 415 U.S. at 261 (emphasis added). Indeed, the Court has so often repeated this holding as to leave no doubt as to its meaning and continued validity. *See Soto-Lopez*, 476 U.S. at 904; *Zobel*, 457 U.S. at 60 n.6; *accord Hooper*, 472 U.S. at 618 n.6. Likewise, this Court's decision in *Zobel* would otherwise be unsupportable as no other state than Alaska offered a bounty to its citizens. Here, the State has conceded that the newcomer residents disadvantaged by the residency requirement are all bona fide residents of California. Pet. App. at A5; *Green*, 811 F. Supp. at 517-518.

Moreover, the State's argument is factually inaccurate on this record. As the courts below found, "the measure cannot fairly be said to provide the same payment as new

residents could have received in the state of their prior residence since the cost of living, particularly housing, varies so substantially from state to state and generally is much higher in California than elsewhere." Pet. App. at A14 n.13; *Green*, 811 F. Supp. at 521 n.13. The District Court specifically found based upon the evidence in the record, and the Court of Appeals therefore affirmed, that "California's housing costs are higher than any other state except Massachusetts", and that under the challenged statute "new California residents migrating from 45 of the[] 46 states [with lower AFDC benefits] will face higher costs of living with no increase in their benefits." Pet. App. at A14-15 n.13; *Green*, 811 F. Supp. at 521 n.13.[6]

Petitioners presented no evidence to the District Court which controverted these findings, nor did Petitioners contest the findings on appeal. Further, Petitioners never disputed that Respondents faced irreparable injury or that, as the District Court also found, all were "unable to locate housing in California that is affordable to them on the reduced AFDC payment." Pet. App. at A19; *Green*, 811 F. Supp. at 523.

Thus, contrary to Petitioners' claims (*e.g.*, Pet. at 13, 18-19), the District Court did not hold that "any" penalty would suffice to require heightened scrutiny, but rather that the statute in the present case in fact works severe

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[6] Petitioners do not contend that the District Court's factual findings as then affirmed by the Court of Appeals, were clearly erroneous. Fed. R. Civ. P. 52(a); *see also Baker v. Schofield*, 243 U.S. 114, 118 (1917) (concurrent findings of two lower courts as to matter of fact will not be disturbed unless clearly erroneous.)

deprivation of the basic necessities of life.[7] Whether the deprivation to newcomers of other less fundamental benefits would similarly constitute an impermissible penalty is not a question presented by this case. *See Shapiro*, 394 U.S. at 638 n.21 (expressing no view on validity of residence requirements for such things as tuition, and hunting, fishing, or professional licenses); *see also Memorial Hospital*, 415 U.S. at 259 n.13; *Zobel*, 457 U.S. at 64 n.11; *Dunn v. Blumstein*, 405 U.S. 330, 342 n.12 (1972).

The State also attempts to distinguish this case from *Shapiro* and *Memorial Hospital* because the deprivation of benefits is partial, no matter how drastic, though not total. *See, e.g.*, Pet. at 11. The *Shapiro* court, however, based its holding not on the dollar amount of the reduction in benefits but upon the denial of the ability to obtain basic necessities. *Shapiro*, 394 U.S. at 627. This impact upon the basic necessities of life has been emphasized repeatedly by this Court. *See, e.g., Soto-Lopez*, 476 U.S. at 908 (plurality), 921-922 (O'Connor, J., dissenting); *Zobel*, 457 U.S. at 64 n.11; *Memorial Hospital*, 415 U.S. at 259, 261 (majority opinion), 285, 288 (Rehnquist, J., dissenting). As the courts below determined, "Like *Shapiro*,

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[7] Indeed, uncontroverted expert testimony presented to the trial court explained that durational residency requirements produce an even greater adverse impact on indigent families today than they did a generation ago when they were first struck down by this Court, given the increase in female-headed households since then. These families are least capable of coping with financial hardship, because fewer job opportunities exist for women, because of greater work-related expenses such as child care, and because women who leave with their children are often fleeing domestic violence with no resources or realistic prospect of support from their spouses. Pls.' Ex. 27, ¶4; CR 69.

the measure limits welfare and the basic necessities of life." Pet. App. at A13; *Green*, 811 F. Supp. at 521.

Furthermore, contrary to the State's argument, this Court has invalidated statutes which reduced rather than wholly eliminated benefits to new state residents. Both *Memorial Hospital* and *Zobel v. Williams* involved reductions in benefits based on the length of state residency. Providing partial benefits to new residents rather than denying benefits entirely, did not save either statute. *Memorial Hospital*, 415 U.S. at 260; *Zobel*, 457 U.S. at 63-64. Indeed, two of the statutes found unconstitutional in *Shapiro* itself provided for some assistance to new residents. *See* 394 U.S. at 622 n.2, and 624 n.3. The Court has several times over decided the question raised by this case.

Indeed, *Shapiro* held that "even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional." 394 U.S. at 638. *See also Soto-Lopez*, 476 U.S. at 915-916 (Burger, C. J., concurring); *Hooper*, 472 U.S. at 623; *Zobel*, 457 U.S. at 65. These cases demonstrate that California's durational residency requirement lacks even a rational relationship to a legitimate state purpose. As the courts below stated, Petitioners did not show – in fact, they could not show – that recent arrivals are somehow better able to live on reduced welfare benefits than long-term residents, and they have provided no "sensibl[e]" reason for discriminating against these needy families other than for the impermissible purpose of deterring their migration. Pet. App. at A17-18; *Green*, 811 F. Supp. at 522-23.

Thus, even under the rational basis review urged by Petitioners, the result in this case would be the same. For this reason as well this case does not merit review.

II. THIS CASE PRESENTS NONE OF THE FACTORS THAT WOULD WARRANT OVERRULING A QUARTER-CENTURY OF THIS COURT'S PRECEDENTS ON RESIDENCY DISCRIMINATION.

Undoubtedly recognizing that *Shapiro* and its progeny control the outcome of this case, Petitioners ask this Court to overrule these cases. In making this argument, however, the State entirely ignores the principles of *stare decisis*.

"[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2808 (1992). This Court has stated that while the principles of *stare decisis* cannot be applied mechanically, the doctrine is of fundamental importance in ensuring that our "jurisprudential system . . . is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

A party seeking to overrule precedent must therefore demonstrate extraordinary reasons before the Court will reconsider settled precedent. These reasons have included:

> [W]hether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that

> would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Casey, 112 S. Ct. at 2808-2809 (citations omitted). In addition, the Court has required that the question be answered whether the old rule "after being . . . tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." *Patterson*, 491 U.S. at 174 (citations omitted).

Petitioners, while citing *Casey*, do not address these considerations or otherwise provide support for their assertion that this is a case where the principles of *stare decisis* should be set aside.[8] The State's only argument is that "[i]n light of the budget crises that California and other states have been facing, the principles of *Shapiro* are unworkable and should be reconsidered." Pet. at 18.

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[8] Petitioners cite *United States v. Dixon*, ___ U.S. ___, 113 S. Ct. 2849, 2864 (1993) for the proposition that *stare decisis* should be ignored. However, *Dixon* involved a single and relatively recent precedent, *Grady v. Corbin*, 495 U.S. 508 (1990). The Court decided to overrule *Grady* because it was a new rule that itself contravened an "unbroken line of decisions," contained "less than accurate" historical analysis, and had produced "confusion." *Id.* The circumstances here could scarcely be more opposite. It is Petitioners who are challenging a large body of law stretching back a quarter of a century that has produced no confusion and contained no inaccurate historical analysis.

States have attempted to use budgetary problems to justify discriminatory residency requirements in *Shapiro* and in each subsequent case. The various defendants involved in *Memorial Hospital* and *Shapiro* also pled drastic budget problems in defense of their durational residency laws. *See, e.g.*, Brief of Maricopa County at 9-10, *Memorial Hospital* (No. 72-1917); Brief of State of Pennsylvania at 14, *Shapiro* (Nos. 68-9, 68-33, 68-34); Brief of State of Connecticut at 17, *Shapiro* (Nos. 68-9, 68-33, 68-34). The Court uniformly repudiated these claims. *Memorial Hospital*, 415 U.S. at 263; *Shapiro*, 394 U.S. at 633.

The argument that a budget crisis can justify circumventing the Constitution is particularly disingenuous here considering the relative amounts involved, even accepting at face value the State's own figures. The State estimated, for example, that it would save $22.5 million in state funds in the 1993-94 fiscal year. Pet. App. at A22, ¶5. This is less than one percent of the $2.8 billion in state funds California expected to spend on AFDC alone in fiscal year 1992-1993. Pet. App. at A23, ¶2. Moreover, the State could have accomplished the same savings and avoided the invidious discrimination simply by reducing the State's portion of grants to all AFDC recipients by a mere 76 cents per month.[9]

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[9] The 76 cents per month figure was derived by dividing the estimated annual savings of $22.5 million by the number of AFDC recipients in California (2,458,600 per month according to the State, Pet. App. at 23, para. 2) and then dividing by twelve. The actual monthly cut per recipient would be about a dollar and a half when federal matching funds are included. *See* Pet. App. at 21, ¶2.

Faced with the reality that fiscal savings to the State from this measure are minimal, Petitioners are forced to take the extreme position that "[t]he degree to which the Statute relieves the state's fiscal crisis is . . . of *no* constitutional significance." Pet. at 16 (emphasis added). Petitioners fail to cite any authority for this novel position; certainly it is inconsistent with their request that this Court elevate such fiscal reasons as a basis for abandoning twenty-five years of doctrine.

Finally, this Court and other federal and state courts throughout the country have relied on *Shapiro* without any difficulty. The holding has been routinely applied to cases involving welfare benefits as well as other issues. *See, e.g., Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903-906 (1986); *Memorial Hospital*, 415 U.S. 250, 269 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338-343 (1972); *Lowrie v. Goldenhersh*, 716 F.2d 401, 412-413 (7th Cir. 1983); *Eddleman v. Center Township*, 723 F. Supp. 85, 88-89 (S.D. Ind. 1989); *Starns v. Malkerson*, 326 F. Supp. 234, 237-238 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971); *Opinion of the Justices*, 257 N.E.2d 94 (Mass. 1970); *Mitchell v. Steffen*, 504 N.W. 2d 198 (Minn. 1993) *cert. denied sub nom. Steffen v. Mitchell*, No. 93-720, ___ U.S. ___, 114 S. Ct. 902 (1994); *Nielsen v. Social Service Board of North Dakota*, 216 N.W.2d 708, 713-715 (N.D. 1974). Indeed, the District Court in this case applied this Court's precedents in a memorandum decision issued barely a month after the case was filed, and a unanimous panel of the Court of Appeals summarily affirmed within two weeks of oral argument.

In fact, it is the State's proposed rule that is inherently unworkable. The State suggests that this Court adopt a multi-factor "undue burden" test comparing for

each state the extent to which a particular requirement deters migration. Pet. at 19-20. This formulation would require that courts examine relative standards of living, budgetary impact, and empirical evidence of deterrent effect. The test proposed would surely spawn years of litigation over the validity of various discriminatory schemes. It is precisely this sort of unending inquiry that *Shapiro* has wisely and effectively prevented, and that this Court's jurisprudence on federalism was designed to arrest.

Thus, Petitioners' contention that this case presents issues appropriate for reconsideration by this Court does not merely misconstrue *stare decisis*, but simply ignores its long-standing principles altogether. The State's Petition should be denied.

III. THIS CASE DOES NOT PRESENT A LIVE CASE OR CONTROVERSY IN LIGHT OF *BENO V. SHALALA*.

The California statute at issue in this case by its express terms is only operative upon approval by the federal government. Cal. Welf. & Inst. Code § 11450.03(b) (West 1994). As Petitioners acknowledge (Pet. at 5 n.4), the Ninth Circuit Court of Appeals on July 13, 1994, vacated the necessary federal approval. *Beno v. Shalala* ___ F.3d ___, No. 93-16411, 1994 U.S. App. LEXIS 17043 (9th Cir. July 13, 1994). By letter to the clerk of the Ninth Circuit dated July 29, 1994, the federal appellees stated that they do not intend to challenge the decision of the court. Ex. 1. This case is therefore moot.

In *Beno*, the Ninth Circuit reversed the denial of a motion for preliminary injunction against the imposition by the State of California of reductions in state AFDC benefits. The court held that 42 U.S.C. § 1315(a) required the United States Secretary of Health and Human Services (HHS) to consider factors mandated by the statute and objections submitted to her before granting the state a waiver of a federal mandate otherwise proscribing the reductions. The court vacated the waiver and remanded the case to the district court with instructions to remand to the Secretary for compliance with the statutory mandate.

The residency provision at issue in this case requires as a necessary prerequisite approval by the Secretary of HHS of the very waiver vacated in *Beno*. *See* Pet. App. at A4; *Green*, 811 F. Supp. at 917 and n.3; *Beno*, 1994 U.S. App. LEXIS at *3, *5-*6. By operation of the requirement, AFDC assistance levels for eligible recipients migrating to California within the past year drop below otherwise federally-mandated levels, and waiver for the residency restriction must be obtained from HHS. *See* 42 U.S.C. § 1396a(c)(1) (1994); *Beno*, 1994 U.S. App. LEXIS at *5-*6. Moreover, under the *Beno* decision, the Secretary cannot reapprove the state's waiver request, or any element of it, without considering plaintiffs' objections, including those objections previously submitted against institution of the residency requirement. *Beno*, 1994 U.S. App. LEXIS at *63-*64.

Once the Ninth Circuit vacated the waiver authorizing the cut, the residency requirement itself was automatically extinguished. Petitioners can no longer enforce the requirement against Respondents. The rule, of course, is

well-settled that the Court may not " 'decide questions that cannot affect the rights of litigants in the case before [it].' " *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (*quoting North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). To avoid issuing a decision which would be merely advisory, this Court should deny the Petition for Writ of Certiorari.

At the same time, it is premature to examine the constitutionality of the previously in force but now invalid residency requirement. Secretary Shalala, upon reviewing of the State's resubmitted waiver request and the objections presented thereto, may well elect to reject the request in its entirety, or that part of it calling for imposition of a residency requirement. But whatever her eventual determination, it has not yet occurred. Respondents not only have had no concrete action taken against them, it is possible that they never will. As such, there is no controversy even ripe for review. *See Reno v. Catholic Social Services*, ___ U.S. ___, 113 S. Ct. 2485, 2495-2496 (1993).[10]

On grounds of both mootness and ripeness, the State's petition should therefore be denied. Surely in light of the remarkable character of Petitioners' principal argument in support of review by this Court – that a quarter-century of this Court's jurisprudence on residency discrimination should be overturned – there ought to at least exist a residency requirement for the Court to examine. For now, that condition cannot be satisfied.

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[10] It is also premature to grant review in a case which is only at the preliminary injunction stage and where the Ninth Circuit panel has specifically retained jurisdiction over the case. *Cf.* Sup. Ct. R. 11.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: August 26, 1994.

Respectfully submitted,

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Exhibit 1

U.S. Department of Justice

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July 29, 1994

BY FEDERAL EXPRESS

Ms. Cathy Catterson
Clerk, United States Court of Appeals
for the Ninth Circuit
121 Spear Street
Second Floor
San Francisco, CA 94105-1566

Re: Beno v. Shalala, No. 93-16411 (decided July 13, 1994)

Dear Ms. Catterson:

On July 20, federal appellees sought an extension of time in which to file a petition for rehearing or rehearing en banc in the above-captioned matter. On July 25, the Court granted our motion, setting August 17 as the last day for filing such a petition.

The purpose of this letter is to inform the Court that we have determined not to file a petition for rehearing or rehearing en banc.

Thank you for your attention to this matter.

Sincerely,
/s/ E. T. S.
Edward T. Swaine
Counsel for Federal Appellees

cc: Melinda Bird, Esquire
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